Supreme Court, U.S.
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No. 93-151

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CLIFF GREENE, *pro se*,

Petitioner,

vs.

NEW YORK STOCK EXCHANGE, INC.; Arbitration Department; ROBERT CLEMENTE; ROY ROWSELL, Arbitration Counsel,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the District Court's dismissal of petitioner's claims against a sponsor of an arbitration proceeding under the doctrine of arbitral immunity improper when the dismissal was based on agreement among the Courts of Appeals that have addressed the issue that arbitral immunity applies to sponsors of arbitrations?

STATEMENT PURSUANT TO RULE 29.1

Respondent New York Stock Exchange, Inc. has no parent company. Each of its subsidiaries is wholly owned, except for Securities Industry Automation Corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

STATEMENT PURSUANT TO RULE 29.1 ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

Summary of Argument 2

I. THE DISTRICT COURT PROPERLY INVOKED THE DOCTRINE OF OF ARBITRAL IMMUNITY 3

II. THE DISTRICT COURT'S DECISION WAS IN ACCORDANCE WITH UNIFORM PRECEDENT AMONG THE COURTS OF APPEALS AND IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT 5

CONCLUSION 6

TABLE OF AUTHORITIES

CASES **PAGE**

Austern v. Chicago Bd. Options Exch.,
898 F.2d 882 (2d Cir.), *cert. denied*,
498 U.S. 850 (1990) 3, 4, 5

Butz v. Economou, 438 U.S. 478 (1978) 3, 5

Corey v. New York Stock Exch.,
691 F.2d 1205 (6th Cir. 1982) 3, 4, 5

Forrester v. White, 484 U.S. 219 (1988) 5

Imbler v. Pachtman, 424 U.S. 409 (1976) 3, 5

Ozark Air Lines, Inc. v. National Mediation Bd.,
797 F.2d 557 (8th Cir. 1986) 3, 4, 5

Yaselli v. Goff, 275 U.S. 503 (1927) 5

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is an action brought by petitioner *pro se* against respondent New York Stock Exchange, Inc. (the "Exchange") based on the Exchange's role as the sponsor of an arbitration proceeding commenced by petitioner against the brokerage house of Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch"). Petitioner also named as defendants two employees of the Exchange's arbitration department, respondents Robert Clemente and Roy Rowsell.

In the arbitration, petitioner obtained a $30,000 award in his favor. Petitioner has been paid the award by Merrill Lynch. Pet. at 3[1]. Petitioner had sought approximately $1.1. million in compensatory damages and $4 million in punitive damages. Pet. at B-1. In his complaint against the Exchange and its employees, petitioner appeared to allege that the arbitrators selected by the Exchange had awarded him less than what he had sought because of racial bias, fraud and fundamental unfairness. Petitioner contends that he is entitled to damages in the amount of approximately $1.1 million, which is the difference between the amount of compensatory damages he sought in the arbitration and the amount he was awarded. Petitioner purported to bring his claims against the Exchange under the Fourteenth Amendment, 42 U.S.C. §§ 1981, 1983, and the Federal Arbitration Act, 9 U.S.C. § 10. Pet. at 2-10, B-2.

REASONS FOR DENYING THE WRIT

Summary of Argument

The Court of Appeals for the Second Circuit affirmed the District Court's dismissal of petitioner's claims "substantially for the reasons set forth" in the District Court's decision. Pet. at A-2. Contrary to petitioner's misstatements in his petition, the District Court dismissed petitioner's claims solely on the ground that the Exchange and its employees are immune from civil liability under the well-established doctrine of arbitral immunity with respect to the Exchange's sponsorship of the arbitration. Pet. at B-3.

The District Court relied on the uniform precedent among the Courts of Appeals that arbitrators enjoy absolute immunity from civil liability because their role in an arbitration is "functionally comparable" to that of a judge. Pet. at B-3.

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[1] "Pet." refers to the Petition For A Writ Of Certiorari.

Based on this reasoning, and the agreement of the Courts of Appeals that have addressed the issue that arbitral immunity extends to sponsors of arbitration proceedings, the District Court properly held that the Exchange and its employees were immune from civil liability with respect to petitioner's claims. Pet. at B-3 (citing *Austern v. Chicago Bd. Options Exch.*, 898 F.2d 882, 886 (2d Cir.), *cert. denied*, 498 U.S. 850 (1990)); *see Ozark Air Lines, Inc. v. National Mediation Bd.*, 797 F.2d 557, 564 (8th Cir. 1986) (arbitral immunity extends to sponsors of arbitrations); *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982) (same).

Moreover, the District Court's decision does not conflict with any decision of any of the Courts of Appeals regarding the doctrine of arbitral immunity and is consistent with the reasoning of this Court concerning quasi-judicial immunity, as set forth in *Butz v. Economou*, 438 U.S. 478 (1978), and *Imbler v. Pachtman*, 424 U.S. 409 (1976). The District Court's decision involved nothing more than the application of a settled and uniformly-accepted legal doctrine to facts that fell easily within the scope of that doctrine. It is inappropriate for consideration by this Court.

I.

THE DISTRICT COURT PROPERLY INVOKED THE DOCTRINE OF OF ARBITRAL IMMUNITY

Petitioner misapprehends the District Court's decision to dismiss his claims against the Exchange insofar as he contends that the dismissal was based on some reason in addition to arbitral immunity. Pet. at 5-8. The District Court dismissed petitioner's claims based solely on its holding that the Exchange, and its employees, are protected from claims for civil liability under the doctrine of arbitral immunity.

As the District Court recognized, "[b]ased primarily on the 'functional comparability' of the arbitrator's role in a

contractually agreed upon arbitration proceeding to that of his judicial counterpart, the Courts of Appeals that have addressed the issue have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity." Pet. at B-3 (quoting *Austern v. Chicago Bd. Options Exch.*, 898 F.2d 882, 886 (2d Cir.), *cert. denied*, 498 U.S. 850 (1990) (citing decisions from the Ninth, Eighth, Fifth, Sixth, Seventh, and Third Circuit Courts of Appeals)). As these courts have held, "[a]s with judicial and quasi-judicial immunity, arbitral immunity is essential to protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants." *Austern*, 898 F.2d at 886 (quoting *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982)).

The District Court, by dismissing petitioner's claims, merely adhered to the unremarkable proposition adopted by the Courts of Appeals that have ruled on the issue that arbitral immunity extends to a "sponsoring organization . . . for all functions that are integrally related to the arbitral process." *Austern*, 898 F.2d at 886. Indeed, such an extension "is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended . . . is illus[ory]. It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring organization." *Corey*, 691 F.2d at 1211; *see Ozark Air Lines*, 797 F.2d at 564 (quoting *Corey*).

As the Court of Appeals for the Second Circuit stated, not to extend immunity to a sponsor of arbitration "would merely serve to discourage its sponsorship of future arbitrations -- a policy that is strongly encouraged by the Federal Arbitration Act." *Austern*, 898 F.2d at 886. Following this reasoning and the uniform rulings of the Courts of Appeals, the District Court correctly held, and the Second Circuit affirmed, that the Exchange and its employees were "immune from civil liability" with regard to petitioner's claims arising out of the arbitration between petitioner and Merrill Lynch. Pet. at B-3.

II.

THE DISTRICT COURT'S DECISION WAS IN ACCORDANCE WITH UNIFORM PRECEDENT AMONG THE COURTS OF APPEALS AND IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT

The District Court's application of arbitral immunity to the Exchange, as the sponsor of an arbitration, does not conflict with any decision of the Courts of Appeals. Indeed, the District Court's decision was in accordance with the holding of every Court of Appeals that has addressed the issue of whether arbitrators enjoy immunity from civil liability for claims related to their role in an arbitration proceeding and whether such immunity extends to entities that sponsor arbitrations. Thus, no split of authority or unresolved issue of pressing importance exists among the Courts of Appeals as a result of the Court of Appeals' affirmance of the District Court's decision.

Moreover, the District Court's decision is entirely consistent with the doctrine of "functional comparability" as articulated by this Court in its decisions concerning quasi-judicial immunity. *See Butz v. Economou*, 438 U.S. 478, 511-17 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Yaselli v. Goff*, 275 U.S. 503 (1927). The reasoning set forth in *Butz* and *Imbler* is responsible for the genesis of the doctrine of arbitral immunity. *See Austern*, 898 F.2d at 886 (citing the decisions of the Courts of Appeals which refer to the "functional comparability" of arbitrators with judges in recognizing arbitral immunity); *cf. Forrester v. White*, 484 U.S. 219, 227 (1988) (immunity from civil liability is "justified and defined by the functions it protects and serves, not by the person to whom it attaches"), *cited in Austern*, 898 F.2d at 886. Not surprisingly, this same reasoning is the basis for the decisions of the Courts of Appeals extending arbitral immunity to sponsors of arbitrations. *See Austern*, 898 F.2d at 886; *Ozark Air Lines*, 797 F.2d at 564; *Corey*, 691 F.2d at 1211.

Thus, the District Court's decision was based on its application of uniform and settled precedent among the Courts of Appeals and is neither in conflict with any decision of any Court of Appeals nor inconsistent with any decision of this Court. For these reasons, it is inappropriate for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: August 26, 1993

Respectfully submitted,

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